In the present case, as the attaching creditor is in no better position than the second defendant, the assignor of the chose in action, it must be argued that, notwithstanding the fact that the second defendant set his hand to exhibit A, and received valuable consideration therefor, the law of the Federated Malay States is such that he can still claim beneficially the interest under the contract with which he has purported to part. Such a proposition need only to be stated to be rejected, quite apart from the fact that the second defendant does not, for one moment dispute that he has parted with all his interest. If the second defendant had fraudulently attempted to claim the interest which he had assigned for valuable consideration, he would in all probability have brought himself within the provisions of the Penal Code. I have no doubt then, that it is in accordance with the principles of elementary justice, as well as consonant with common sense, to hold that, when the second defendant executed a document purporting to transfer his interests in the moneys payable by the Public Works Department to the plaintiff, and when he admitted before the Court that he had no further interest himself, he had in fact transferred such interest. Accordingly there was nothing for the judgment creditor to attach.

In my view, therefore, the judgment of the learned Magistrate was right, and the appeal must be dismissed with costs.

*Appeal dismissed.*

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[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J.

June 10, 1933.

**MARIAN REBELLO**
**P. A. PERIES** ... **Defendants-Appellants**

vs.

**HARBANS SINGH** ..... **Plaintiff-Respondent**

[SELANGOR CIVIL APPEAL No. 18 of 1932]

*Evidence—Promissory note—Signatories signing as sureties—Evidence Ordinance, section 92.*

When a promissory note is signed by several signatories promising to pay "jointly and severally," it is not open to any of the signatories, by virtue of the provisions of section 92 of the Evidence Ordinance, to allege that they signed as sureties. Any agreement that they should be treated as sureties is not collateral to the promissory note, but in direct contradiction of it, and therefore inadmissible in evidence.

*S.K.R.S.L. Somasundram Chetty* v. *Lim Ham Kai*, (1927) S.S.L.R. 64, followed.

*Raman Chetty* v. *Sarkies*, (1929) S.S.L.R. 128, not followed.

*R. Ramani* and *K. K. Benjamin* for the appellants.

*G. Terrell* for the respondent.

*Cur. Ad. Vult.*

**TERRELL, AG. C.J.**—The claim in this case was for $990 on a promissory note signed by all the defendants in favour of the plaintiff, and on which they were jointly and severally liable. The promissory note was dated the 31st October, 1931. On the 2nd November, 1931, the 1st defendant gave a bill of sale on his office effects in favour of the 3rd defendant and the plaintiff, to secure the sum of $980. It is said that the difference in the amount was a clerical error. Whether this was so or not, there can be little doubt that the bill of sale was to secure the same debt as was secured by the promissory note. This bill of sale was executed without the knowledge of the 2nd defendant, who did not hear of it till a month later. After giving his evidence in chief, and after having been cross-examined on behalf of the 2nd defendant, the 1st defendant consented to judgment, and the case was then adjourned. Shortly afterwards the 1st defendant left the country and was never cross-examined by the plaintiff or the 3rd defendant.

The main defence of the 2nd and 3rd defendants was that, although signing as principals they were in fact to the knowledge of the plaintiff sureties, and that he accepted them as such. If they were sureties, it was contended that the execution of the bill of sale varied the original contract, and also gave time to the principal debtor, and accordingly that the sureties were discharged. The 2nd and 3rd defendants also alleged misrepresentation, and merger of the original contract, the promissory note, in the contract evidenced by the bill of sale.

The learned trial Judge gave no decision on the question whether it was competent for the 2nd and 3rd defendants to allege that they were sureties, in view of section 92 of the Evidence Ordinance, but he found that the promissory note could only be varied by a binding contract and that, as he was satisfied that the bill of sale was not a binding contract, it was not open to the 2nd and 3rd defendants to rely on it, and that accordingly their defence failed whether they were sureties or not. On the issue of misrepresensation, he found against both defendants on the facts. He also decided against the defendants on the issue of merger, on the ground that a valid contract cannot be merged in a void contract. Accordingly, judgment was entered for the plaintiff for the amount claimed less a sum of $200, which the trial Judge found had been paid to the plaintiff by or on behalf of the defendants after the promissory note had been signed.

On the appeal the 2nd and 3rd defendants put forward the same arguments, except that the issue of merger was abandoned. They also put forward an argument based on section 222 of the Civil Procedure Code, which declares that every agreement to give time for the satisfaction of a judgment debt shall be void unless made for consideration and with the sanction of the Court.

It is true that previously to the execution of the promissory note the plaintiff had obtained a judgment, against the 1st defendant, and had attached his property in execution, and that on the signing of the promissory note the attachment was released. The 1st defendant had also raised a defence under section 222 in his pleadings, but as he consented to judgment, this point was never argued on his behalf. Neither the 2nd nor the 3rd defendants raised this defence on their pleadings, and the Court refused to allow them to raise it on the appeal. In any case I fail to see how this defence would have helped them, no judgment had been obtained against them, and I see nothing in Section 222 which prevents 3rd parties from making themselves responsible for a judgment debtor's debt.

On the issue of misrepresentation I see no reason for dissenting from the findings of the learned trial Judge, who had an opportunity of hearing the witnesses.

On the question of the appellants being sureties, I am satisfied that in view of the provisions of Section 92 of the Evidence Ordinance, it is not open to them to so allege when they signed as principal debtors. It appears to me that any agreement that they should be treated as sureties is not collateral to the promissory note, but in direct contradiction of it, and therefore inadmissible. I prefer to follow the decision of the Court of Appeal in the Colony in *Somasundaram Chetty* v. *Lim Ham Kai*, (1927) S.S.L.R. 64, to that of Sir William Murison in *Raman Chetty* v. *Sarkies*, (1929) S.S.L.R. 128, which I find difficult to distinguish on the facts from the decision in the former case.

As I have come to the conclusion that it is not open to the appellants to allege that they were sureties, the question of the validity of the bill of salo becomes immaterial. I will only say that, although I am doubtful if it is void on all the grounds enumerated by the learned trial Judge, I am satisfied that the attestation does not comply with the provisions of the Enactment. Not only is the attestation clause not signed at the foot, but the names of the parties to whom the Magistrate is bound to explain 'the nature and effect thereof' are omitted. It appears to me that this objection is fatal, and that at all events on this ground the bill of sale is void.

This really disposes of all the grounds of appeal. It did occur to me after reading the record, that the only possible defence was one under section 62 of the Contract Enactment, viz., that a new agreement, namely, the bill of sale, had been substituted for the promissory note, or, in other words, that there had been a novation. This defence was raised in all three of the defences, but it was not argued at the trial, nor did the appellants make it one of their grounds of appeal. For this purpose it would have to be proved that the parties had agreed to release the original agreement, *i.e.*, the promissory note by substituting a new agreement, the bill of sale. There is authority for saying that in these circumstances it is immaterial if it is subsequently discovered that the new agreement is unenforceable. There was certainly considerable *prima facie* evidence that this is what actually happened. Apart from the *viva voce* evidence of all the defendants that they considered that their liability on the promissory note was at an end, there is the letter of the 1st November, 1931, (exhibit E) in which the 3rd defendant attempted to repudiate his liability on the promissory note immediately after it was signed. Further there was every reason why the plaintiff should assent to the new arrangement. He received $200 on account, and he got a specific charge on the 1st defendant's only available assets in lieu of an attachment which, as subsequent events proved, he would have to share with other attaching creditors. It is true that the plaintiff denies that there was this arrangement, and alleges that he paid no attention to the bill of sale, and never had it in his possession. There is, however, verbal evidence to the contrary, and it must be observed that the 3rd defendant's letter of the 13th February, 1932, (exhibit F), written at the dictation of the plaintiff, is quite inconsistent with the attitude taken up by the plaintiff at the trial.

On the other hand, the defendants did not urge this defence at the trial, and notwithstanding a suggestion from the Bench, appellants' counsel refused to adopt it on the appeal. Further, the 1st defendant was never cross-examined on this point by the plaintiff, and in view of the defendants' conduct of the proceedings, the learned trial Judge was not called upon to make any finding as to whether the defendants' or the plaintiff's testimony on this point should be accepted. On the whole therefore I find it impossible without hearing the witnesses to come to a finding on disputed facts, which were never considered or argued in Court below.

I would, therefore, dismiss the appeal with costs. It is agreed that the plaintiff recovered a sum of $72.29 as a result of the execution, and this sum will have to be deducted from the principal sum recovered. The deposit must be paid out to the respondent.

**WHITLEY, J.**—This is an appeal from the judgment of Thorne, Acting Chief Justice, for moneys due upon a promissory note. The plaintiff some weeks prior to the making of the note recovered judgment against the first Defendant who was an advocate and solicitor practising at Kuala Lumpur. To enforce this judgment he attached the assets of the first Defendant in his office at 73 Klyne Street. The first Defendant negotiated with the plaintiff and the second and third Defendants with a view to obtaining a release from this attachment and an arrangement was made whereby the Plaintiff agreed to release if he was paid $200 in cash and a promissory note was executed in his favour by the three Defendants. The note, the subject of this suit was signed by the Defendants on the 31st October, 1931, and the learned trial Judge has found that the $200 was also handed to the Plaintiff in part payment of the amount of the note.

The note was a joint and several note in the usual form, the Defendants jointly and severally promising to pay $990 one month after date with interest at 24% per annum.

Two days later on 2nd November a bill of sale on his chattels at his office was signed by the first Defendant in favour of the 3rd Defendant and the Plaintiff to secure the payment of $980 by two monthly payments of $490. It is apparent upon a close examination of this bill of sale that the name of the Plaintiff alone was first typed as grantee and that it was erased and the name of the third Defendant was then typed over the erasure and the name of the Plaintiff written after it in ink.

Beyond the $200 already referred to no payments were made on the promissory note and no action was taken on the bill of sale. On the 10th March, 1932, the Plaintiff sent to each of the Defendants formal notice of demand for payment of the promissory note. He received no reply and on the 22nd March these proceedings were commenced.

The first Defendant filed a defence but at the hearing he consented to Judgment.

By their defences the second and third Defendants (the present appellants) pleaded that they signed as sureties and that as the bill of sale gave further time to the principal debtor the making of it released them from any liability on the note. The second Defendant further pleaded that her signature to the note was obtained by misrepresentation on the part of the Plaintiff.

The third defendant further alleged that he signed the note in blank and that his authority to the Plaintiff was to complete the note for $600 and not $990. Lastly he alleged that the contract in the note became merged in the bill of sale.

As regards the defence of misrepresentation the learned trial Judge accepted the evidence of the plaintiff and held that the second Defendant had failed to establish that any misrepresentation was made either by or on behalf of the Plaintiff. This was a pure question of fact and the onus was upon the second Defendant and there was ample evidence upon which the Judge could come to the conclusion at which he arrived.

As regards the allegation that the third Defendant signed the note in blank I think the learned trial Judge was right in holding as a fact that there was not sufficient evidence to establish that contention.

The defence upon which the Appellants mainly relied was that they signed as sureties and the question arises whether in view of the plain terms of the note itself and the provisions of section 92 of the Evidence Ordinance it was open to them to give evidence of an oral contract whereby it was agreed that they signed only as sureties. The trial Judge decided the case on another point but it may be useful to consider this point also as it was one which frequently arises in our Courts.

Section 91 of the Evidence Ordinance provides that when the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract except the document itself and section 92 provides that no evidence of any oral agreement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from the terms of such document.

The terms of the note in this case are perfectly clear. The Appellants sign a promise to pay "jointly and severally." They do not sign as sureties. Any evidence of an oral agreement to sign only as sureties would accordingly be evidence for the purpose of varying the terms of the note and is therefore inadmissible unless it can be brought within one or other of the provisos to section 92. It was contended that such evidence would come within proviso 2 or proviso 6.

Proviso 2 reads:—

> "The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

Proviso 6 reads:—

> "Any fact may be proved which shows in what manner the language of a document is related to existing facts."

There are two reported cases on this point in the Colony where the law of evidence is the same as it is here. In *Raman Chettiar* v. *Sarkies*, (1929) S.S.L.R. 128, Murison, C.J. allowed oral evidence to be given under proviso 2 in an action between the holder and one of the makers of a promissory note to prove that such maker was only a surety but in *S. K. R. S. L. Somasundram Chetty* v. *Lim Ham Kai*, (1927) S.S.L.R. 64, the Court of Appeal presided over by Murison, C.J. held that the only evidence admissible to prove that a signatory to a note signed as a surety and not as a principal is either evidence to prove that the case comes within one of the provisos to section 92 or such evidence of surrounding circumstances as is required to show in what manner the language of the document is related to existing facts. In the course of the judgment of the Court of Appeal it was pointed out that in England it is a rule of equity which allows a person to prove that he signed as surety and in *Balkishen Das* v. *Legge*, (1899) 27 I.A. 58, the Privy Council held that the English Chancery Cases have no application to the Law of India (which in this respect is the same as the law of the Colony and of the Federated Malay States) and that therefore the case had to be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as was required to show in what manner the language of the document was related to existing facts. The Board ruled that under section 92 oral evidence of intention was not admissible for the purpose of construing the documents or ascertaining the intention of the parties unless the case could be

brought within the provisos. The oral evidence which it is sought to adduce is evidence that the Appellants signed as sureties and I do not think that such evidence can come within the provisos inasmuch as it is inconsistent with the clear terms of the document.

In my opinion the provisos do not go further than to provide that where a written contract is not clear or where there is a patent or latent ambiguity, oral evidence may be admitted to show the real intention of the parties; but where a contract is clear and unambiguous it is not competent for either party to call oral evidence to show that it means something different from what it appears to mean.

The learned trial Judge held that even if the Appellants were merely sureties the bill of sale was void and that consequently there was no binding contract on the part of the Plaintiff to give time to the principal debtor which would release the sureties under the provisions of section 135 of the Contract Enactment.

Section 6 of the Bills of Sale Enactment No. 13 of 1922 provides that every bill of sale made or given by way of security for the payment of money shall be void if it is not made in the form A in the second schedule of that Enactment. It is to be noted that the Enactment requires the bill of sale to "be in the form" and not as in the English Act "in accordance with the form" and it has been held in the Colony that if a bill of sale is not made in the form given in the schedule it is absolutely void. It was further held that even though the divergence is not substantial the bill of sale will still be void. *Menatchy* v. *Trusty*, 3 S.S.L.R. 12. The form must be followed *verbatim et literatem*, *Re Estate of Lim Kong Chuan deceased*, 5 S.S.L.R. 70.

This bill of sale does not follow the form in at least two material particulars. It has the name of the grantor instead of the grantees in the proviso for non-liability to seizure and the attestation is not as laid down in the form.

For these reasons I agree that the Bill of Sale is bad and as the sureties have to show that there was a valid agreement by the creditor to give time to the principal debtor (*Damoda Das* v. *Mohamed Hussain*), I.L.R. 22 All. 351, they are still liable.

On one point only, with respect, I differ from the learned trial Judge. He was of opinion that the bill was void in respect of the chattels because they were not sufficiently specifically described. There was no evidence of difficulty in identifying and it lies upon the party attacking the bill of sale to bring evidence to show that the description is insufficient (*Davidson* v. *Carlton Bank*), (1893) 1 Q.B. 82, and (*Hickley* v. *Greenwood*), 25 Q.B.D. 277.

The defence of novation or merger cannot succeed unless it is proved, as provided by section 62 of the Contract Act, that the parties agreed to substitute a new contract namely a Bill of Sale for the original contract. The evidence is that the second Defendant knew nothing about the making of the bill of sale until long after it was made and the Plaintiff denies ever having agreed to any such substitution. It may be that the bill of sale gave him something more concrete than the note but on the other hand there seems no reason why he should release the second Defendant, a person of substance, from all liability on the note without securing something in return. The onus was on the Defendants to prove an agreement to substitute a new contract and they clearly failed to discharge that onus. I would dismiss the appeal with costs. It was agreed by counsel that the amount recoverable by the Plaintiff should be reduced by $72.29 and the order of the learned trial Judge should be varied accordingly.

**GERATHY, J.**—I have had an opportunity of reading the judgment of the learned Acting Chief Justice with which I am in entire agreement.

The three short points in this appeal are as follows:—

(1) Is it open to the second and third defendants to allege that they signed the promissory note as sureties?

(2) Is the Bill of Sale executed subsequently valid, and

(3) If so, did the execution of the Bill of Sale vary the original contract and thus discharge the sureties?

On the first point I am of opinion that the appellants are precluded by Section 92 of the Evidence Ordinance from showing that they signed the promissory note as sureties for this would be a direct contradiction of its terms. In *S. K. R. S. L. Somasundram Chetty* v. *Lim Ham Kai*, (1927) S.S.L.R. 64, it was held by the Court of Appeal in the Colony that the only evidence admissible to prove that a signatory to a note signed as surety and not as principal is either evidence to prove that the case comes within one of the provisos of Section 92 of the Evidence Ordinance or evidence of surrounding circumstances as is required to show in what manner the language of the document is related to existing facts. In my opinion the present case does not come within any of the provisos of Section 92 and that any agreement that the appellants should be treated as sureties is inadmissible.

In regard to the second point I take the view that whatever may be the effect of other defects in the Bill of Sale, the defective attestation is fatal to its validity, and that it is clearly void under section 6 (b) of the Bills of Sale Enactment 1922.

That being so the third point does not arise. I agree with the learned trial Judge that the Bill of Sale not being a binding contract it was not open to the second and third defendants to rely on it and that this defence failed whether they were sureties or not.

On these grounds I would dismiss the appeal with costs and order the deposit to be paid out to the respondent. The sum of $72.29 having been recovered by the Plaintiff as a result of execution, must be deducted from the principal sum covered.

*Appeal Dismisse*